

Advisory Committee on Acoustic Impacts on Marine Mammals

Sponsored by the Marine Mammal Commission

**Sixth and Final Plenary Meeting
September 20-21, 2005**

Bethesda, Maryland

Meeting Summary

November 16, 2005

Prepared by the Facilitation Team of

**Suzanne Orenstein
Lee Langstaff**

Advisory Committee on Acoustic Impacts on Marine Mammals

Sixth and Final Plenary Meeting
September 20-21, 2005
Bethesda, Maryland

Meeting Summary

The sixth and final meeting of the Advisory Committee on Acoustic Impacts on Marine Mammals was held on September 20-21, 2005 in Bethesda, Maryland. The Advisory Committee, convened by the Marine Mammal Commission, is comprised of a diverse group of representatives of entities that produce sound in the marine environment, government agencies with responsibilities or activities significant to marine mammals, scientists with pertinent expertise, and non-governmental environmental and animal welfare organizations. The chief goal of this meeting was to reach consensus on an Advisory Committee Final Report to the Marine Mammal Commission.

Originally scheduled for September 20th through the 22nd, the meeting was adjourned at 10am on the 21st by unanimous agreement of the Advisory Committee members present. During the meeting, Advisory Committee members spent a significant amount of time in caucus discussions. This summary reflects the plenary discussions only.

DAY ONE – Tuesday, September 20, 2005

Welcome, Introductions, and Opening Remarks

Suzanne Orenstein, Facilitator, opened the meeting by inviting Committee members and their alternates, Committee staff, facilitators, and observers to introduce themselves. A list of meeting attendees is attached (Attachment A). A few Advisory Committee members were unable to attend the meeting or to send an alternate: Ken Balcomb, Buck Sutter, and Dick West.

David Cottingham, Marine Mammal Commission, began by thanking Advisory Committee participants for the intensive effort and commitment they have shown, particularly since the previous plenary meeting. He reminded participants that the Advisory Committee had set lofty goals for itself in its charter. He noted that the Committee has worked hard to meet its goals, but acknowledged the persistence of some remaining gaps. He reiterated that the goal of the meeting was to achieve consensus on an Advisory Committee product. He concluded by reminding Committee members that this would be the last meeting of the Advisory Committee, and that in the absence of consensus on a Committee product, an alternative no-consensus plan proposed by the Marine Mammal Commission in early September would be the fall-back plan (see below for further discussion of the specifics of this proposal).

Joel Reynolds, Natural Resources Defense Council, took a few moments to note the recent and untimely death of Ben White, of the Animal Welfare Institute. He noted that Mr. White attended and provided public comment at most of the meetings of this Advisory Committee, and urged that while not everyone might have agreed with his views, his passion and deep commitment to protecting marine life from ocean noise, as well as other threats, was undeniable. He described Mr. White as a unique and courageous advocate who was skeptical but hopeful with regard to the Advisory Committee process.

Review of Activities Since Fifth Plenary Meeting

Suzanne Orenstein took a few moments to review the activities that had occurred since the fifth Advisory Committee meeting (April 19-21, 2005) and what they mean for the goals for this meeting and status of Advisory Committee efforts:

- At the April plenary meeting, the Advisory Committee considered a draft report (April 1, 2005 draft), identified significant needed improvements, and agreed on a process for revising the various sections accordingly, including an outside review of the chapter on the Synthesis of Current Knowledge (this process is described in the written summary of the fifth plenary meeting). The 6th plenary meeting, originally planned for July 2005, was rescheduled for September 2005 to provide the time needed to implement the agreed-on process. Over the summer, the Subcommittees and Working Groups held numerous meetings and conference calls to revise the drafts of the various sections, resulting in a revised final draft – the August 5, 2005 draft.
- Advisory Committee members reviewed the August 5th draft and identified issues that would make consensus difficult or impossible from their perspectives. The members submitted extensive comments to the facilitators (summarized in Attachment B), and participated in two conference calls to discuss how to proceed.
- In response to the comment process, the Marine Mammal Commission noted that the number and nature of the comments on the August 5th draft indicated the likelihood that consensus might not be possible and, in two memoranda to Advisory Committee members (dated September 1 and September 9, 2005), proposed an alternative plan should consensus not be reached (Attachment C). This proposal included the following key components:
 1. Preparation by the facilitators and the Commission of a short synopsis of the Advisory Committee process. Committee members would review this process summary, which would then be revised accordingly.
 2. Preparation and submittal to the Marine Mammal Commission of individual, caucus, or cross-caucus statements that express Advisory Committee members' perspectives in response to the Advisory Committee's charter. This process would be subject to agreed-on rules governing the preparation of these statements (*e.g.*, page limits; range of topics; deadline for receipt). These statements, along with the process summary described above, would constitute the Advisory Committee's report to the Commission.
 3. The Marine Mammal Commission would prepare a report to Congress in response to its charge. The Commission would attach the Advisory Committee's report (described in steps 1 and 2 above) to its own report to Congress.

4. The Advisory Committee members would receive the Commission's report upon its transmittal to Congress, and would retain the option, if they wished, of submitting their own, separate reports to Congress.
- Advisory Committee members agreed to continue to work toward consensus on a report to the Marine Mammal Commission at this sixth and final meeting, and to focus their efforts specifically on reaching agreement on the Executive Summary, the chapter on the Synthesis of Current Knowledge (excluding the section on strandings), and the chapter on Management and Mitigation.

Review of Agenda, Ground Rules, Scope and Procedures for Meeting

Ms. Orenstein went on to review the agenda, noting the need to take some time initially to clarify and agree on the scope, goal, procedures, and ground rules for this last meeting. She emphasized that on the first day the substantive focus would be on "the big picture," at the level of the Executive Summary, in an effort to identify potential agreements. This would involve a combination of caucus meetings, brief summary presentations of caucus discussions and conclusions, and plenary discussions aimed at reaching agreements. If this approach proved fruitful, a similar approach would then be used to address the chapters on Synthesis of Current Knowledge and Management and Mitigation on subsequent days.

After discussing a draft prepared by the facilitators, the Committee agreed on a set of ground rules and procedures for the meeting, which can be found in Attachment D. There was some disagreement regarding options for reflecting disagreements within the text of a consensus report, but after some discussion the Advisory Committee agreed on procedures for this. They also agreed on a "No Consensus Fall Back Plan" based on the proposals made by the Marine Mammal Commission in their 1 and 9 September, 2005 memoranda.

Fifth Plenary Meeting Summary

Lee Langstaff, Facilitator, noted that no comments or proposed edits to the draft summary of the fifth plenary meeting (distributed on June 30, 2005) had been received. She inquired as to whether any Committee members had any objections to the finalizing the summary. Several members requested one more day to review the draft. This was agreed, and on the morning of the second day, Committee members approved the summary after no new edits were proposed. The meeting summary is available on the Commission's website, <http://www.mmc.gov/sound>.

Executive Summary

In preparation for this meeting, individual Advisory Committee members and caucus groups¹ were invited to submit proposals for how they would revise the Executive Summary (August 5, 2005 draft) in a way that would address their concerns while taking into consideration the perspectives of other parties, based on the comments each had submitted on the August 5th draft. Five such proposals for revisions were submitted (from the environmental NGO caucus, the federal agency caucus, the researcher caucus, the Marine Mammal Commission, and the California Coastal Commission). Some of these proposals were distributed electronically just prior to the meeting and others were provided at the meeting. Each caucus was given an opportunity to provide a brief explanation of their proposed revisions, after which time the four caucuses met separately to review and discuss the proposed Executive Summary revisions from other caucuses and to develop proposals for consensus language to bring back to the plenary.

The various caucus groups were asked to address the following points:

- Proposals for plenary group agreement on the things of importance to the caucus
- What proposal(s) from others can you live with?
- Proposals for dealing with other “chapters” (time permitting)

Advisory Committee members worked in caucuses or independently for the remainder of the morning and through lunch. The meeting resumed in plenary after lunch to discuss proposals for revisions to the Executive Summary.

In their discussions, Advisory Committee members reached initial agreements regarding organizational changes to the Executive Summary, and on the inclusion of language referencing the work of four recent National Research Council (NRC) panels related to marine mammals and sound. However, in spite of protracted efforts throughout the afternoon and into the evening, the Advisory Committee was unable to come to resolution on how to address a number of issues on which members’ views continued to differ significantly. These included:

- How to characterize potential and actual threats to marine mammals from anthropogenic sound in the context of other threats (*e.g.*, fishing bycatch), in particular, the relative significance of anthropogenic sound compared to other threats to marine mammals about which more may be known;
- The inclusion of a discussion on the role of precaution in the face of uncertainties when managing and mitigating the impacts of anthropogenic sound on marine mammals;
- The inclusion of language supporting the need for improvements in the identification and implementation of mitigation measures; and
- Whether or not to have a distinct section listing disagreements in the Executive Summary and/or whether and how to describe disagreements in the text.

Discussion on these topics continued throughout the afternoon, with breaks to hear public comment (summarized below), and then for dinner.

¹ The Advisory Committee generally organized itself into 4 caucus groups: the environmental and animal welfare NGOs, the oil and gas industry, the federal agencies, and the researchers. Some members participated in more than one group, and some members chose not to join any caucus.

Advisory Committee members reconvened after dinner ² and resumed their deliberations regarding the Executive Summary. One member proposed a list of disagreements as an organizing mechanism for deciding the issues on which to focus discussion. After reviewing that list, the Advisory Committee acknowledged that there were a number of controversial issues for which further discussion was not likely to produce consensus. Committee members agreed to consider alternative ways forward. They identified several options for moving ahead, which are described below.

Option 1: Marine Mammal Commission proposal as reflected in the meeting ground rules and procedures (see Appendix D)

Option 2: Continue to work on the August 5th draft of the chapters on Synthesis of Current Knowledge and Management and Mitigation, focusing only on bracketed text and any “make or break” issues in those chapters

Option 3: Focus only on “make or break issues” and key disagreements in the entire August 5th draft

Option 4: Work for agreement only on Synthesis of Current Knowledge and Management & Mitigation chapters

Option 5: Work from the federal caucus proposed versions of the Executive Summary and the Management and Mitigation Chapter, and from the researcher caucus proposed revision of the chapter on Synthesis of Current Knowledge

Option 1 was the only one that received unanimous support from all of the Committee members (or alternates) present. While several members expressed disappointment that the group was unable to achieve agreement, all agreed to pursue this option. It was further agreed that the focus of the second day of the meeting would be on agreeing on the steps and ground rules for this path forward.

Public Comment

Russell Wray, COAST. Mr. Wray provided lengthy comment, which he also submitted in writing. The full text of his comments can be found at www.mmc.gov/sound, and highlights are briefly summarized here. He noted his concern that the problem facing the Advisory Committee largely stems from thinking of the oceans as a “highways of commerce” rather than as home to marine life, and urged that it is time to look at the oceans in a different light. He stated that while society’s dependence on noise-producing activities is noted in the draft report, it does not point out that this dependence may not be desirable. He described the Advisory Committee membership as being predominantly made up of sound producers or regulators and researchers who are funded by the sound producers, resulting in an imbalanced group. He went on to say that while a key part of the report was likely to be a call for more research, what is needed is immediate action based on what we know now. He noted that calling for more research amounts to a stall

² Three Advisory Committee members were unable to participate in the evening session, but supported the plan to do so. Two of those members were represented by alternates in the discussion.

tactic such as has been seen on the topic of climate change. He stated his concern that efforts to manage ecosystems suggest that humans can control nature, but that a rapidly deteriorating environment suggests that this view reflects human arrogance. He urged the Advisory Committee to recognize that they are talking about the lives of non-human creatures and their quality of life, and to view the oceans with an eye towards the rights of all life.

DAY TWO – Wednesday, April 20, 2005

Suzanne Orenstein opened the day's session by reminding Committee members of the previous evening's unanimous decision to proceed with the no-consensus plan proposed by the Marine Mammal Commission, and that the goal for the remainder of the meeting would be to agree on the ground rules and procedures for implementing this plan.

To begin the discussion, Committee members reviewed the four-step proposal from the Marine Mammal Commission, as described in their September 1 and 9 memoranda to Advisory Committee members and in the meeting's ground rules and procedures (see Attachments C and D).

Ground rules proposed by the Marine Mammal Commission in their September 9th memorandum served as starting point for discussion. Advisory Committee members agreed to the following ground rules for implementing this process,

- Development of individual, caucus, and multi-caucus statements should begin as soon as possible.
- After the ground rules are agreed upon, the Commission and facilitators will not participate in the development of these statements; development is the responsibility of the author(s).
- Statements will refrain from characterizing the views and positions of other Committee members.
- Statements will be consistent with the agreed Advisory Committee Operating Procedures and responsive to the charge set forth in the Advisory Committee's charter.
- Authors may provide drafts of their statements to other members of the Advisory Committee, but are not obligated to do so.
- Final statements will be due to the Marine Mammal Commission no later than close of business Friday, 18 November 2005.

During this discussion, David Cottingham noted the Marine Mammal Commission's opposition to the development of "majority" or "minority" reports. He suggested that if multiple members of the Advisory Committee agree on particular findings or recommendations, they may wish to state these in their non-consensus statements. He urged that use of the terms "majority" or "minority" in these statements is unnecessary and counter to the spirit of the Advisory Committee process.

In addition, there was a great deal of discussion regarding page limits for the non-consensus statements to be submitted by Advisory Committee members. Committee members were unable to agree on page limits, and David Cottingham (Marine Mammal Commission), the Designated Federal Official, made an executive decision that no page limits would be imposed. However, following the plenary meeting, the Commission reconsidered this decision and informed Committee members that the 30-page limit per statement as originally stated in their proposal

would stand (see Attachment E, memorandum to Advisory Committee members dated September 29, 2005).

Finally, Advisory Committee members noted that the working drafts developed by Subcommittees and Working Groups on behalf of the Advisory Committee do not represent, and should not be characterized as, consensus or endorsed products of the Advisory Committee. While drafts have been made publicly available as required by the Federal Advisory Committee Act, these documents have no standing *per se* and should not be cited in any way as representative of the views of the Advisory Committee. The Marine Mammal Commission agreed that it will continue to make available copies of all drafts, presentations, and other materials related to the Advisory Committee process in compliance with the Federal Advisory Committee Act, but as requested by some Advisory Committee members will not post the April 1, 2005 or August 5, 2005 draft reports on its website.

Closing Remarks

In closing, Ms. Orenstein emphasized the credit due to all Advisory Committee members, their alternates and supporting staff, as well as Subcommittee and Working Group members for working so hard over a year and a half to clarify the nature of the potential threat to marine mammals from anthropogenic sound and to explore the ways in which they might be effectively addressed. She noted that it will become clear that a great deal of important information has been gathered together and shared even though consensus was not achieved. She thanked the group for their efforts and willingness to work collaboratively.

David Cottingham also thanked Advisory Committee members and others for their efforts, and thanked the facilitators, Suzanne Orenstein and Lee Langstaff, for their efforts to assist the Advisory Committee, Subcommittees and Working Groups. In addition, he gave special thanks to Erin Vos for her critical role in the entire process, as well as other staff at the Marine Mammal Commission.

The meeting was adjourned at 10:00 a.m.

ATTACHMENTS

- A. Attendance at the Sixth Plenary Meeting of the Advisory Committee on Acoustic Impacts on Marine Mammals
- B. August 30, 2005 memorandum from Suzanne Orenstein and Lee Langstaff to Advisory Committee Members regarding Comments on August 5 Draft Final Report
- C. September 1, 2005 and September 9, 2005 memoranda from David Cottingham, Marine Mammal Commission to Advisory Committee members regarding Process forward and Response to 6 September conference call
- D. Proposed Ground Rules and Procedures for Plenary 6
- E. September 29, 2005 memorandum from David Cottingham, Marine Mammal Commission, to Advisory Committee members regarding Advisory Committee wrap-up

ATTACHMENT A

**Attendance at the Sixth Plenary Meeting of the
Advisory Committee on Acoustic Impacts on Marine Mammals
September 20-21, 2005**

Committee Members and Alternates (32)

Mark Boensel	Office of the Chief of Naval Operations
Jack Caldwell	Consultant
David Cottingham	Marine Mammal Commission
Sarah Dolman	Whale and Dolphin Conservation Society
Chip Gill	International Association of Geophysical Contractors
Morgan Gopnik	The Ocean Conservancy
Marsha Green	The Ocean Mammal Institute
Erin Heskett	International Fund for Animal Welfare
John Hildebrand	Scripps Inst. of Oceanography, Marine Mammal Commission
Michael Jasny	Natural Resources Defense Council
Darlene Ketten	Woods Hole Oceanographic Institution
Martin Kodis	U.S. Fish and Wildlife Service
Robert LaBelle	Minerals Management Service
Bill Lang	Minerals Management Service
Stephen Leathery	National Marine Fisheries Service
Kathy Metcalf	Chamber of Shipping of America
Paul Nachtigall	Hawaii Institute of Marine Biology
Dick Pittenger	Woods Hole Oceanographic Institution
G. Michael Purdy	Lamont-Doherty Earth Observatory
James Ray	Shell Global Solutions (US), Inc., Oceanic Environmental Solutions, LLC
Michael Reeve	National Science Foundation
Joel Reynolds	Natural Resources Defense Council
Naomi Rose	Humane Society of the United States
Alexander Shor	National Science Foundation
V. Frank Stone	Office of the Chief of Naval Operations (N45)
Bruce Tackett	ExxonMobil Corporation
Peter Tyack	Woods Hole Oceanographic Institution
Sara Wan	California Coastal Commission
Lindy Weilgart	Dalhousie University
Donna Wieting	National Marine Fisheries Service
Judy Wilson	Minerals Management Service
Peter Worcester	Scripps Institution of Oceanography
Nina Young	The Ocean Conservancy, Orcas Consulting

ATTACHMENT A

Staff (2)

Alyssa Campbell
Erin Vos

Marine Mammal Commission
Marine Mammal Commission

Facilitators (2)

Suzanne Orenstein
Lee Langstaff

Independent Facilitator
Independent Facilitator

Observers (27)

Linda Bauch
Daryl Boness
Roger Gentry
Robert Gisiner
Margaret Frailey Hayes
Robert Hofman
Ken Hollingshead
Mary Gray Holt
Michael Kearns
Anurag Kumar
Barbara Lashinger
Jill Lewandowski
Tom McIntyre
Rodger Melton
Rebecca Nadel
W.E. Rasmussen
Jerome Rosenberger
Jennifer Salerno
Hélène Scalliet
Bill Schmidt
Amy Scholik
Mandy Shoemaker
Mary Sohlberg
Russell Wray
Andrew Wright
John Young
David Zinzer

American Petroleum Institute
Marine Mammal Commission
Consultant
Office of Naval Research
Department of State, Office of Oceans Affairs
Marine Mammal Commission, retired
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
National Ocean Industries Association
Geo-Marine, Inc.
Stanley Associates
Minerals Management Service
ASM
ExxonMobil Corporation
Shell Exploration and Production
ExxonMobil Exploration Company
IDA—Science and Technology Policy Institute
Booz Allen Hamilton
NOAA, National Marine Sanctuary Program
National Park Service
Geo-Marine, Inc.
Naval Facilities Engineering Command
U.S. Coast Guard
COAST
National Marine Fisheries Service
ExxonMobil Exploration Company
Minerals Management Service

ATTACHMENT B

To: Advisory Committee Members
From: Suzanne Orenstein and Lee Langstaff
Re: Comments on August 5 Draft Final Report
Date: August 30, 2005

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We received extensive comments from three caucuses and fourteen committee members on the August 5 Draft Report. It is clear that all of you worked very hard to identify and outline your concerns with the report. We are circulating the completed comment summary forms that we received for your review. For most of you this was the first opportunity to see all the revised pieces together and to consider the report as a whole. We have taken from the comments the impression that many of you found that the report falls short in its reflection of issues important to you and often leans in directions that you find to be inconsistent with your perspectives. You will see from even a quick review of the comments that there are numerous significant continuing disagreements about the tone, content, and acceptability of the draft report.

We are sending this summary and the comments so that the Advisory Committee can discuss them together in our call on September 6 from 1 PM to 4 PM EDT. The call information is 800/597-0731; Suzanne Orenstein and David Cottingham are the chairs.

Summary

There were some positive comments on the report, but, by far, the majority were negative. The questions on the comment summary form asked for elucidation of the concerns and problems, so the fact that the majority were negative is understandable. The positive comments all noted that the report contains valuable information.

The “major heartburn” issues and disagreements that we identified in our review include the following:

1. **Lack of agreement and clarity about the extent of the problem.** Some feel the document inappropriately reflects an assumption that there is a known and serious problem. Others feel that the document downplays what they see as a serious and immediate problem, and inadequately reflects an urgent need for action to address that problem. Sub-issues here include opposing proposals from multiple commenters to specify:
 - a. How the issue of anthropogenic sound compares to other anthropogenic threats to marine mammals;
 - b. The relative importance and urgency of mitigation versus research;
 - c. The need for the application of an increased level of precaution by regulators; and
 - d. The significance and consequences of restricting economically important activities that produce sound.
2. **The tone of the report.** Several feel it is not positive enough about what is already being done; others believe it is weak because it is not sufficiently forward-thinking regarding actions that could be taken now but aren't. Some commented that it implies

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an inappropriate and insupportable sense of certainty about potential negative impacts that would require additional research to confirm or disprove. Others feel the report falls short by not providing a vision for how to avoid adverse effects that are uncertain and are unlikely to be fully understood in the near future, even with additional research.

3. **Adequacy of the recommendations.** Comments include:
 - a. Many of the recommendations are weak, in that they call for things that are already being done, and suggest that it should be noted when recommended actions are ongoing, but offer nothing new.
 - b. They are not specific enough, especially for mitigation of specific sound sources. Some desire the identification and recommendation of specific mitigation tools that have the best chance of being effective (exclusion zones and sound reduction) and others strongly stated that recommending those tools is not acceptable.
 - c. They do not adequately acknowledge or describe the recommendations from the previous NRC efforts.
 - d. The research needs as outlined are not useful or reflective of Committee deliberations, and there is not a clear rationale for their prioritization.
4. **Diametrically opposed proposals and strong disagreements** regarding the following issues:
 - a. Use of the terms sound and noise;
 - b. Inclusion of a discussion of the potential for bias in research related to funding sources;
 - c. Use of the term precaution and the inclusion and degree of emphasis on the need for a precautionary or cautious approach;
 - d. Recommending changes to the regulatory or statutory framework;
 - e. Inclusion of the ICES-based table in the strandings section;
 - f. Descriptions of association, correlation, and cause and effect between sound sources and strandings;
 - g. Recommendations for or endorsement of CEEs and a discussion of the animal welfare issues associated with them;
 - h. The proposal for allocation of a specified amount of funding to certain research needs; and
 - i. The importance of effects that do not have population level impacts.
5. **Synthesis of Current Knowledge.** Five commenters felt that the chapter was not useful to a lay audience, and many of the specific suggested edits to the chapter directly conflict with one another. Many found portions of the strandings section unacceptable, with differing views of which portions are not acceptable. Some commenters would like the strandings section to be a separate section, or to otherwise have a more prominent place in the report.
6. **International Efforts chapter.** Many edits were suggested for the chapter, often in opposition to one another. Multiple commenters asked for edits to clarify and improve the section on ICES, and there is disagreement about whether to recommend ratification

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of the Law of the Sea. There are objections to implying that there is a need for international oversight. Some recommend deleting most descriptions of treaties because they felt these are not germane. Still others object to including language describing current U.S. Government policy positions.

7. **Missing elements.** Several issues of importance to various parties were identified as missing:
 - a. A clear statement of a lack of evidence of any long-term impacts of anthropogenic sound on marine mammals;
 - b. Discussion of the burden of proof issue, specifically noting that the burden of demonstrating lack of a significant impact should fall to those who wish to pursue activities that knowingly introduce sound into the marine environment;
 - c. Definition of “practicable;”
 - d. Description of the findings of the NRC reports, and discussion of how they are related to or differ from the work of this (and other) efforts;
 - e. Discussion of the need to eliminate political interference in science; and
 - f. Acknowledgement of a leading role of the United States on this issue, in terms of research, management, and legislation.

ATTACHMENT C

MEMORANDUM

September 1, 2005

TO: Advisory Committee Members
FROM: David Cottingham
RE: Process forward

Based on our review of the comments received from members of the Advisory Committee, including the Commission's, on the 5 August draft report, we are convinced that the Committee will not reach consensus on the content of the report. Many people have identified what they consider to be "fatal flaws" in the tone, findings, and recommendations of the document. The memo from the facilitators summarizing major issues in those comments identifies a number of important issues for which consensus is not possible because of opposing viewpoints. Whereas the Committee members agree on some general issues, a seemingly unbridgeable gulf exists regarding many of the important topics.

The Commission undertook this dialogue with the end goal of developing recommendations to Congress. To this end we established a process to encourage diverse interests to express their views in an open, public forum with the aim of informing the Commission's deliberations on this topic. Although we fully participated in all aspects of the process, it did not provide the clarity we believe is necessary for a report to Congress. We are now faced with deciding how best to use the group's discussions to formulate a report to Congress. We see little value in continuing negotiations on the text of the August 5 draft final report, due to the extensive and discordant nature of the comments Committee members have submitted.

As conveners of the Advisory Committee, the Commission offers the following proposal as a potential path forward:

Step 1. The Commission, with assistance from the facilitators, would prepare a short synopsis of the process explaining that we brought people with diverse interests together to engage in dialogue and develop recommendations endorsed by all or most stakeholders regarding how best to proceed to address potential effects of noise on marine mammals. This report would note that Committee members remained divided on most key issues. Committee members would be given an opportunity to provide comments on a draft, which the Commission and facilitators would revise accordingly.

Step 2. Members of the Committee would have an opportunity to provide to the Commission individual, caucus, or cross-caucus statements that express their perspectives on the issues the group discussed in response to the Advisory Committee's charter. The full Committee would first discuss and agree on rules governing the preparation of these statements (*e.g.*, page limits; range of topics; deadline for receipt). These individual, caucus or cross-caucus statements would be submitted to the Commission by the end of October and be forwarded, without change, to Congress as part of the Commission's report.

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Step 3. The Commission would prepare a report to Congress in response to its charge. Our report would append all individual/caucus statements received by the deadline, as well as the synopsis of the process described in #1 above.

Step 4: The Committee members would receive the Commission's submitted report and retain the option, if they wished, of submitting their own, separate reports to Congress.

We propose that Committee members discuss this proposal, and any other options you might raise, on the conference call on Tuesday, Sept. 6 from 1-4pm. In addition, given the range and intensity of opinions submitted regarding the 5 August draft and the likely futility of further negotiations on that document, the Commission would like to discuss the utility of holding the planned three-day meeting in September.

We are committed to finding an outcome that all can live with and look forward to your thoughts. Thank you all for your continued efforts.

ATTACHMENT C

MEMORANDUM

TO: Advisory Committee on Acoustic Impacts on Marine Mammals

FROM: David Cottingham

DATE: 9 September 2005

SUBJECT: Response to 6 September conference call

The Commission was encouraged by the participation of nearly all Advisory Committee members on the 6 September conference call. However, the Commission shares with all Committee members a deep disappointment that, notwithstanding the good faith efforts on the part of all the members, the Committee has not reached meaningful consensus. We urge the Committee to use the upcoming 12 September conference call to agree upon a strategy to bring the Advisory Committee process to a close, and we reiterate below our proposal for this closure.

The conference call identified three action items to which Committee members needed to respond:

- a. their suggestions and concerns regarding the process of developing individual, caucus, and/or cross-caucus statements;
- b. the potential areas on which they think the Advisory Committee may be able to reach agreement; and
- c. their suggestions for how we use the time in the September meeting.

The following are the Commission's responses.

A. Suggestions and concerns regarding the process of developing individual, caucus, or cross-caucus (non-consensus) statements

The Commission remains open to discussion of our proposal and ways to implement it.

We note the following statement from the Advisory Committee's Operating Procedures:

The Committee's charge is to develop recommendations to the Commission for inclusion in a report to Congress from the Commission. The Commission asks the Committee to develop as much consensus on these recommendations as is achievable. On issues where the Committee does not or cannot reach consensus, this will be noted and the Commission may develop, if it so chooses, its own recommendations to Congress on those issues.

The Commission identifies the following topics as potentially meriting discussion in the proposed individual, caucus, and cross-caucus statements:

- Key areas of scientific agreement and uncertainty/disagreement regarding the impacts of human-generated sound on marine mammals and the ecosystems on which they depend, including views on:
 - The degree of current scientific uncertainty,
 - The extent of the problem,
 - The relative significance of anthropogenic sound among other threats to marine mammals, and
 - Useful sources of information (e.g., NRC reports).

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- Identification and prioritization of research in critical areas to resolve uncertainties or disagreements and improve management/mitigation.
- Discussion of key issues related to research, including views on:
 - Animal welfare ethics considerations for directed marine mammal research such as CEEs and ABR experiments,
 - Research permitting/authorization concerns, and
 - Research funding concerns.
- Recommended management actions and strategies to help avoid or mitigate possible adverse effects of anthropogenic sounds on marine mammals and other components of the marine environment, including discussion of:
 - Assessment of the effectiveness of current management and mitigation approaches (e.g., permitting and authorization),
 - The relative importance of mitigation versus research efforts,
 - Views on cost effectiveness, practicality/practicability, burden of proof, and balancing other interests,
 - Approaches to management in the face of scientific uncertainty (e.g., views on precautionary approaches), and
 - Views on international/multi-lateral approaches and cooperation.

We propose the following “ground rules” for these statements, as a starting point for discussion:

- Development of individual, caucus, and multi-caucus statements should begin as soon as possible.
- Maximum 30 pages total length per statement (including references).
- After the ground rules are agreed upon, the Commission and facilitators will not participate in the development of these statements; development is the responsibility of the author(s).
- Statements will refrain from characterizing the views and positions of other Committee members.
- Statements will be consistent with the agreed Advisory Committee Operating Procedures and responsive to the charge set forth in the Advisory Committee’s charter.
- Authors may provide drafts of their statements to other members of the Advisory Committee, but are not obligated to do so.
- Final statements will be due to the Marine Mammal Commission no later than COB Monday, 31 October 2005.

B. Potential areas on which Advisory Committee may be able to reach agreement

We would first like to clarify that the goal for this exercise must still be consensus—that is, “all members can live with the results.” Thus, we interpret this action item as a request for the identification of areas where the entire Advisory Committee may be able to reach consensus, not simply where some members (whether a majority or not) are able to reach agreement within or among caucuses. The Commission undertook the FACA process in hopes of fostering information sharing, dialogue, and most importantly, agreement on recommendations for how to reduce acoustic “threats” to marine mammals. The Advisory

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Committee was therefore structured on a basis of consensus—we wanted to know where common ground exists or might be developed, not just to identify the individual views of the various stakeholders. Where consensus could not be reached, we agreed to acknowledge the lack of agreement with due consideration of the need for full, fair, and equitable treatment of all perspectives on any issue.

The Commission remains skeptical about the possibility of the Advisory Committee reaching consensus on substantive issues. At the heart of this problem, we believe, is the considerable scientific uncertainty about the nature and extent of threats to marine mammals from anthropogenic sound. There are fundamental disagreements about how to interpret and respond to this uncertainty.

In order to provide useful, meaningful recommendations to Congress on this subject, the Advisory Committee as a whole would need to provide (a) clear, compelling rationale for the recommended actions, and (b) a clear path forward. Because of the disagreements that exist over such fundamental issues as the extent of the problem and appropriate level of concern, the Commission believes that the Advisory Committee will not be able to reach consensus on meaningful recommendations for Congress.

We are opposed to the pursuit of “majority” and “minority” reports as such. If multiple members of the Committee agree upon particular findings or recommendations, we encourage them to state that in the non-consensus statements to be attached to the Commission’s proposal (see Step 2 of the proposal, below).

C. Suggestions for how to use 20-22 September meeting

At this time the Commission believes that holding the sixth plenary meeting would be of limited value. The Commission intends to maintain faith with the processes and procedures agreed to by the Committee members. We appreciate all the time and energy people have invested to date, and are concerned that the 20-22 September meeting has a high probability of encumbering several more days of busy people's time without moving the process forward in a productive or useful way. The meeting’s stated purpose was to allow for final negotiations on a consensus report of the Advisory Committee. This purpose seems to have been obviated, as evidenced by the discussions on the 6 September conference call and the comments on the 5 August draft report. With respect to the chief goal of the Advisory Committee—to reach consensus on recommendations—the Commission feels that we may have come as far as we can. Holding the meeting has the potential to lead to further polarization, and counteract the spirit of collaboration with which we entered into the FACA process. It seems likely that the same, or better, results could be achieved through conference calls and emails, rather than an in-person, public meeting for which time to prepare is now extremely limited.

We remain open to discussing whether to hold the September meeting. If, on the 12 September conference call, Committee members are able to provide compelling reasons why the benefits of holding the meeting would outweigh the costs and risks, and are able to reach consensus on a set of attainable goals, an agenda, and ground rules, the Commission is willing to sponsor the plenary meeting. To be considered compelling, the arguments provided in favor of holding the meeting must (a) demonstrate clear benefits to the Advisory

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Committee process, (b) explain why an in-person meeting is needed, (c) provide specific issues to be negotiated, and (d) clearly describe attainable goals for the meeting's outcome.

The Commission notes that the 6 September conference call became heated and accusatory in ways that were not productive or consistent with our ground rules. If the Committee agrees to proceed with the 20-22 September meeting, but the meeting develops along such counterproductive lines, the Commission will terminate the meeting immediately, as is consistent with the provisions of the Federal Advisory Committee Act. The Committee must focus on positive, forward progress, and the Commission will act to avoid exacerbating this already difficult conflict.

If the Committee cannot agree to a set of attainable goals, an agenda, and ground rules for the meeting during the 12 September conference call, we will not hold the meeting. In either case, we will continue to encourage the Committee to come to agreement on means to proceed with implementing the Commission's proposal for bringing the process to a close, as restated below (*new clarifications in italics*):

Step 1. The Commission, with assistance from the facilitators, would prepare a short summary of the Advisory Committee process, explaining that we brought people with diverse interests together to engage in dialogue and develop recommendations endorsed by all stakeholders regarding how best to proceed to address potential effects of noise on marine mammals. This summary would note that Committee members remained divided on most key *issues even after extensive deliberation, but would not make any substantive statements about the issues*. Committee members would be given an opportunity to comment on a draft, which the Commission and facilitators would revise accordingly. *This summary could be negotiated by phone and email, and draft text might be drawn from parts of the existing Introduction of the 5 August draft report. Together with the statements described in Step 2, this would constitute the Advisory Committee report to the Commission.*

Step 2. Members of the Committee would have an opportunity to provide to the Commission individual, caucus, or cross-caucus (*non-consensus*) statements that express their perspectives on the issues the group discussed in response to the Advisory Committee's charter. The full Committee would first discuss and agree on rules governing the preparation of these statements (*e.g., page limits; range of topics; deadline for receipt*). *These rules could be negotiated by phone and email (the Commission's preliminary suggestions for ground rules are described in section B above).* The *non-consensus* statements would be submitted to the Commission by the end of October and be forwarded, without change, to Congress as part of the Commission's report. *Together with the process summary described in Step 1, these statements would constitute the Advisory Committee's report to the Commission.*

Step 3. The Commission would prepare a report to Congress in response to its charge. *The report will likely focus on (a) the review and evaluation of available information (survey of acoustic threats to marine mammals), (b) recommendations regarding research priorities, and (c) recommendations regarding management actions and strategies to help avoid and mitigate possible adverse effects of anthropogenic sound on marine mammals and the marine environment.*

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The Commission will strive to reflect the work of the Advisory Committee in a neutral manner (e.g., by referring to the attached non-consensus statements) in providing the Commission's views on the subject. Our report to Congress would append all individual/caucus statements received by the deadline (Step 2), as well as the summary of the process described in Step 1 above.

Step 4: The Committee members would receive the Commission's submitted report *(with the Advisory Committee's report—Step 1 summary and Step 2 statements—appended) upon its transmittal to Congress.* Committee members would retain the option, if they wish, of submitting their own, separate reports to Congress. *Any such reports would not be part of the Commission's process, and would be independent of the Advisory Committee's report to the Commission and the Commission's report to Congress.*

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Proposed Ground Rules and Procedures for Meeting 6 (Agreed 9/20/05 in Advisory Committee Discussion)

Goal: To achieve consensus on the Executive Summary, the Synthesis of Current Knowledge Chapter without the strandings section, and the Management and Mitigation Chapter

Definition of Consensus

The Committee's Operating Procedures have defined consensus to mean that "all Committee members can live with a given recommendation or decision."

No Consensus Fall Back Plan:

When possible with limited drafting and discussion, disagreements will be noted within the text of the consensus report as follows:

- "The Committee did not agree on this issue," or
- "One view is..., another view is..."

As an addendum to the consensus report of the Committee, all Ctte members and/or caucuses are free to file a statement expressing their perspectives. That statement may include discussion of their perspectives on the areas of disagreement noted in the text of the report. These added statements will identify the author(s) of the statement.

If consensus cannot be achieved on a FACA report to the Marine Mammal Commission by noon on 22 September, the agenda will be revised to focus on discussions that implement the Commission's proposal of 9-1-05, as clarified by memorandum on 9-9-05.

The Operating Procedures state that:

"The Committee's charge is to develop recommendations to the Commission for inclusion in a report to Congress from the Commission. The Commission asks the Committee to develop as much consensus on these recommendations as is achievable. On issues where the Committee does not or cannot reach consensus, this will be noted and the Commission may develop, if it so chooses, its own recommendations to Congress on those issues."

Procedures and Protocols:

- Accusations and statements of blame are not constructive and will impede achieving the goal of the meeting. They will not be allowed.
- Objections to proposals or report language raised in plenary and cross-caucus sessions must be accompanied by proposed alternative language that attempts to meet the needs of all Committee members.
- Voting or straw polls will be used only as a tool to assess the status of discussions. Results of votes or straw polls are not binding.
- Informal offers to compromise are not binding unless they are accepted by consensus, and should not be used to place any participant at a disadvantage in continuing discussions.

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- The Commission, as the Designated Federal Official, may end the meeting at any point it feels that proceeding constructively is not possible.
- Consistent with the operating procedures, anyone may ask for a caucus with any other member or members at any time. Caucuses should try to request caucus time in a manner that respects the agenda and supports plenary progress.
- Caucuses are open only to members and alternates, and key staff who are invited to participate by the caucus.
- To the extent possible, caucuses should join or object to any consensus decision or recommendation as a group during plenary sessions.³
- Both the original operating procedures and these new ground rules apply. If a conflict arises it will be addressed by the Committee.

³ This bullet is intended to respond to the following proposal submitted by the Federal caucus: “The Federal caucus proposes that you establish ground rules for next week's meeting that would limit all voting, if any, to be done at the caucus level only. This will focus overall positions to the most important and basic levels; enhance compromise within and between caucuses and reduce confusion and debate at the plenary meeting. The Federal caucus intends to vote as a group at the meeting and hopes that others will do likewise.”

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MEMORANDUM

TO: Advisory Committee on Acoustic Impacts on Marine Mammals
FROM: David Cottingham, Marine Mammal Commission
DATE: 29 September 2005
RE: Advisory Committee wrap-up

Our meeting last week, like many of its predecessors, exposed a variety of opinions and perspectives regarding issues about which people have intense feelings. With the heat of the meeting behind us, I want to provide a clear statement regarding the Commission's understanding of how we will bring the Advisory Committee process to a close. If you have concerns about this summary, please contact me directly.

Before I reiterate guidelines and timetables below, I want to reinforce a couple of more general points. First, the Commission appreciates all the time and energy that people have invested in this process. We share everyone's frustration that the anticipated consensus document could not be achieved. Second, I hope that everyone will take a moment to refer to the Commission's own comments on the 5 August draft to understand the Commission's perspectives on the substantive work of the group. Finally, the Commission notes that, in the face of all the frustration during the process, some good things were likely to have been ignored to a large extent, including the fact that some excellent science has been done or is underway at present in the United States and elsewhere to help clarify effects of sound—and thereby to assist with useful management alternatives. The inability of the Committee to reach consensus should not negate the fact that good people and agencies and groups currently are working hard to improve the situation. There is a lot more to be done, in the Commission's view, to clarify and, as needed, mitigate effects on marine mammals at the individual and population levels.

Process and Ground Rules

At our sixth plenary meeting in September 2005, the Advisory Committee discussed the 5 August 2005 draft report. After extensive deliberations, the Committee agreed unanimously to discontinue efforts to reach agreement on a single consensus report to the Commission (the intent had been for the Commission to forward a consensus-based Advisory Committee report to Congress). The August 5 draft report was not adopted by the Committee but remains available, on request, to the public as a non-consensus draft. The Committee further agreed to implement the proposal of the Marine Mammal Commission to complete the Advisory Committee process as follows:

Step 1. The Commission, with assistance from the facilitators, will prepare a summary of the Advisory Committee process, explaining that we brought together people with diverse interests to engage in dialogue and develop recommendations that could be endorsed by all stakeholders on how best to proceed to address potential effects of noise on marine mammals. This summary will note that Committee members remained divided on most key issues even after extensive deliberation, but it will not include any substantive statements about the issues or why we did not reach consensus. Committee members will be given an opportunity to comment on a draft of the summary, which the Commission and facilitators will revise accordingly. This summary will be negotiated by phone and/or e-mail, and draft text may be drawn from parts of the existing Introduction section of the 5 August draft report. Together with the statements

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described in Step 2, this will constitute the Advisory Committee report to the Commission.

Step 2. Members of the Committee will have an opportunity to provide to the Commission individual, caucus, or cross-caucus (non-consensus) statements that express their perspectives on the issues that the group discussed in response to the Advisory Committee's charter. The full Committee discussed rules governing the preparation of these statements (e.g., page limits, range of topics, deadline for receipt) during the September plenary meeting; these ground rules are summarized below. The non-consensus statements are to be submitted to the Commission by 18 November 2005 and will be forwarded, without change, to Congress as part of the Commission's report. Together with the process summary described in Step 1, these statements will constitute the Advisory Committee's report to the Commission. Ground rules include the following:

- Development of individual, caucus, and cross-caucus statements should begin as soon as possible.
- Maximum length will be 30 pages total per statement.
- The Commission and facilitators will not participate in the development of these statements; development is the responsibility of the author(s).
- Statements should refrain from characterizing the views and positions of other Committee members.
- Statements should be consistent with the agreed Advisory Committee Operating Procedures and responsive to the charge set forth in the Advisory Committee's charter.
- Final statements are due to the Marine Mammal Commission no later than COB Friday, 18 November 2005.

The Commission further notes that we are opposed to the pursuit of "majority" and "minority" reports as such. If multiple members of the Committee agree upon particular findings or recommendations, we encourage them to state that in the non-consensus statements to be attached to the Commission's proposal as described above. However, we feel that use of the terms "majority" and "minority" in these statements is unnecessary and counter to the spirit with which the Advisory Committee process was undertaken.

Step 3. The Commission will prepare a report to Congress in response to its charge. Our report to Congress will append all individual/caucus statements that comply with the above ground rules and are received by the deadline (Step 2), as well as the summary of the process described in Step 1 above.

Step 4. The Committee members will receive the Commission's submitted report (with the Advisory Committee's report—Step 1 summary and Step 2 statements— appended) upon its transmittal to Congress. Committee members retain the option, if they wish, of submitting their own separate reports to Congress. These reports do not need to abide by the constraints noted above. Any such reports will not be part of the Commission's process and will be independent of the Advisory Committee's report to the Commission and the Commission's report to Congress.

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Suggested Topics

The Commission has offered some suggestions for topics to be discussed in the individual, caucus, or cross-caucus statements. These are repeated below.

- A. Respond to the Advisory Committee's charter, which instructed the group to:
 - 1) Review and evaluate available information on the impacts of human-generated sound on marine mammals, marine mammal populations, and other components of the marine environment,
 - 2) Identify areas of general scientific agreement and areas of uncertainty or disagreement related to such impacts,
 - 3) Identify research needs and make recommendations concerning priorities for research in critical areas to resolve uncertainties or disagreements, and
 - 4) Recommend management actions and strategies to help avoid and mitigate possible adverse effects of anthropogenic sounds on marine mammals and other components of the marine environment.
- B. Respond to the topics presented in the Commission's 9 September 2005 memo, which were identified as potentially meriting discussion in the proposed individual, caucus, and cross-caucus statements:
 - Key areas of scientific agreement and uncertainty/disagreement regarding the impacts of human-generated sound on marine mammals and the ecosystems on which they depend, including views on:
 - The degree of current scientific uncertainty
 - The extent of the problem
 - The relative significance of anthropogenic sound among other threats to marine mammals and
 - Useful sources of information (e.g., NRC reports).
 - Identification and prioritization of research in critical areas to resolve uncertainties or disagreements and improve management/mitigation.
 - Discussion of key issues related to research, including views on:
 - Animal welfare or ethics considerations for directed marine mammal research, such as CEEs and ABR experiments
 - Research permitting/authorization concerns and
 - Research funding concerns.
 - Recommended management actions and strategies to help avoid or mitigate possible adverse effects of anthropogenic sounds on marine mammals and other components of the marine environment, including discussion of:
 - Assessment of the effectiveness of current management and mitigation approaches (e.g., permitting and authorization)
 - The relative importance of mitigation versus research efforts
 - Views on cost effectiveness, practicality/practicability, burden of proof, and balancing other interests
 - Approaches to management in the face of scientific uncertainty (e.g., views on precautionary approaches) and
 - Views on international/multilateral approaches and cooperation.

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C. Respond to the areas of disagreement identified by the Commission during the final plenary meeting:

- Extent of the problem
 - The significance of the threat
 - Relative importance of sound vs. other threats
 - Impact on populations
 - Degree of scientific uncertainty and use of extrapolation
 - How to characterize acoustic energy – sound vs. noise
- Relationship between stranding and sound
 - Level of relationship: cause/effect, correlated, associated
 - Number of relevant stranding or mortality events
 - Range of species involved: beaked whales, other
 - Range of sound sources involved: sonar, airguns, shipping, other
 - Mechanisms of injury: auditory, behavioral, non-auditory
- Effectiveness of current management/mitigation
 - Identification of best practices
 - Cost effectiveness and practicality/practicability
 - Assignment of burden of proof: sound producers vs. regulators
 - Precautionary approach—addressing the uncertainty
 - International or multilateral approach
- Priorities and conduct of research
 - Determination of priority research areas
 - Relative importance of research and mitigation efforts
 - Diversification and distribution of research funding
 - Permitting and authorization for research
 - Animal welfare aspects of research – CEE, ABR
 - Safeguards against bias in research

Federal Advisory Committee Act Compliance

There has been some confusion over the status of the Committee's work with respect to the Federal Advisory Committee Act (FACA). The Commission and other federal agencies have consulted with a FACA expert at the General Services Administration for additional clarification. The Advisory Committee's current charter is valid until November 17, 2005. Our current deadline for submission of statements is November 18, meaning that the Commission will have to renew the charter unless the deadline is shifted to an earlier date. It has also come to our attention that some Advisory Committee members, particularly federal agency representatives, may ask for an extension to the deadline to complete agency clearance processes. The Commission encourages all members to provide their statements by November 17. At this point, the Commission does not plan to extend the deadline for receipt of statements.

We do not intend to hold any additional public, plenary meetings of the Advisory Committee. Development of the process summary described in Step 1 above will occur by means of e-mail and final approval will be done in a telephone "meeting" of the Committee. This is consistent with the requirements of FACA. Furthermore, continuing discussions among members of the Advisory Committee to develop multi-party (non-consensus) statements are not subject to the public meeting requirements of FACA.